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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 71-1485

EDGAR EUGENE HARNESS, JR. ----------PETITIONER

Vs.

COMMONWEALTH OF KENTUCKY ----------RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

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In The

Supreme Court of the United States

No. 71-1485

EDGAR EUGENE HARNESS, JR. ----------*Petitioner*

Vs.

COMMONWEALTH OF KENTUCKY ----------*Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion below from the Kentucky Court of Appeals is styled *Edgar Eugene Harness, Jr. v. Commonwealth of Kentucky,* reported at 475 S.W.2d 485 (1972).

JURISDICTION

Petitioner's application to invoke the jurisdiction of this Court should be denied because it fails to meet the jurisdictional requirements of 28 U.S.C. § 1257(3), the proper provision for review of a state court judgment in a criminal case on certiorari.

The question the petitioner attempts to present here under the Fourteenth Amendment of the Constitution of the United States has never been properly presented to or decided by the courts of Kentucky so as to give this Court jurisdiction to review the judgment on writ of certiorari.

In *Columbia Water Power Co. v. Columbia Electric R.L.&P. Co.*, 172 U.S. 475, 43 L.ed 521, 19 S.Ct. 247 (1898), this Court in discussing jurisdictional requirements stated:

> "There is no doubt that under the third class the Federal right, title, privilege, or immunity *must be,* with possibly some rare exceptions, *specifically set up or claimed* to give this court jurisdiction." (Emphasis added.)

Rule 23-1(f) of the rules of this Court provides in part:

> *"If review of the judgment of a state court is sought,* the statement of the case shall also specify *the stage in the proceedings in the court of first instance and in the appellate court,* at which, and *the manner in which,* the federal questions sought to be reviewed were raised; *the method of raising them* (eg., by a pleading, by request to charge and exceptions, by assignment of error); *and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record,* or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portions of the court's charge and exception thereto, assignment of errors) *as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."* (Emphasis added.)

A review of the record of the state court proceedings in the instant case shows that petitioner did not specifically set up or raise a federal question with the required particularity so as to bring such question to the attention of the state courts. In *Oxley Stave Co. v. Butler County,* 166 U.S. 648, 655, 41 L.ed 1149, 17 S.Ct. 1003 (1896), this Court said:

> ". . . the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

In raising the federal question, it is necessary that the question be presented in the state courts in such a manner that there is no doubt that reliance is upon federal rights rather than state rights. See *New York Central & Hudson River Railroad Co. v. New York,* 186 U.S. 269, 273, 46 L.ed 1158, 22 S.Ct. 916 (1901).

Furthermore, this Court has stated that if it is uncertain whe-

ther a claim is grounded on some provision of the State Constitution or on some provision of the Federal Constitution, it will be assumed that reference is being made to the State rather than the Federal Constitution. See *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67, 68, 73 L.ed 184, 63 S.Ct. 84 (1928).

The Fourth Amendment of the United States Constitution and Section Ten of the Constitution of Kentucky are of like import. In addition, due process under the law, vouched-safe to all citizens by the Fourteenth Amendment of the Federal Constitution, is similarly vouched-safe to the citizens of Kentucky by the Bill of Rights of the Constitution of Kentucky, Section 14. See *O'Brien v. O'Brien*, 294 Ky. 793, 172 S.W.2d 595, 609 (1943).

The fact that petitioner cited United States Supreme Court cases in his briefs to the state court is neither sufficient to raise a federal quesion nor sufficient to establish jurisdiction. Jurisdiction cannot be founded by surmise. *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54, 79 L.ed 191, 55 S.Ct. 16 (1934).

This application for writ of certiorari should be denied, because petitioner failed to set out or raise a federal question with sufficient definiteness so as to bring such question to the attention of the state courts and because petitioner failed to state whether his claim was grounded upon provisions of the Constitution of Kentucky or the United States Constitution.

Even if petitioner could be said to have raised a federal question by intendment, it would be of no consequence in the present case. The decision of the state court was based upon a nonfederal ground, i.e., on state law; and this Court, in *Murdock v. Memphis*, 20 Wall. 590, 22 L.ed 429 (1875), stated that it would not review a state court judgment if there is an adequate and independent state ground which supports the decision of the state courts.

The decision of the Kentucky Court of Appeals was adequately supported by the Kentucky case of *Commonwealth v.*

Thacker, 229 Ky. 488, 17 S.W.2d 399 (1929), which held that it was not proper to go behind the allegations of the affidavit in determining whether the allegations furnish sufficient evidence of probable cause. The affidavit was sufficient on its face to establish probable cause to support the issuance of a search warrant.

Notwithstanding that petitioner had properly raised in the state courts the question he presents here, the Court should decline to review because the judgment of this case was reached upon a nonfederal ground which independently and adequately supports the decision reached by the state court. Thus, determination of the question that petitioner brings here was unnecessary by the state court in its decision of this case.

For the foregoing reasons, respondent submits that petitioner's application for certiorari should be denied because it fails to meet jurisdictional requirements.

QUESTIONS PRESENTED

I. WHETHER THE AFFIDAVIT ON ITS FACE ESTABLISHED SUFFICIENT PROBABLE CAUSE TO SUPPORT THE ISSUANCE OF A SEARCH WARRANT.

II. WHERE ONE PORTION OF AN AFFIDAVIT IS SUFFICIENT TO SUPPORT PROBABLE CAUSE, WILL A SUBSEQUENT DETERMINATION THAT ANOTHER PORTION OF THE AFFIDAVIT WAS BASED UPON "ENTRAPPED INFORMATION" DESTROY THE VALIDITY OF THE SEARCH WARRANT?

III. WHETHER THE COURT OF APPEALS OF KENTUCKY CORRECTLY DECIDED, *BASED ON KENTUCKY LAW*, THAT WHERE THE "AFFI-

DAVIT IS REGULAR IN FORM AND THE STATEMENTS CONTAINED THEREIN SUFFICIENTLY SHOW PROBABLE CAUSE, IT IS NOT PROPER TO GO BEHIND THE ALLEGATIONS OF THE AFFIDAVIT IN DETERMINING WHETHER THE ALLEGATIONS FURNISH SUFFICIENT PROBABLE CAUSE."

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct. Additional material facts and corrections will be set out in the respective arguments which follow.

ARGUMENT

I.

THE AFFIDAVIT ON ITS FACE ESTABLISHED SUFFICIENT PROBABLE CAUSE TO SUPPORT THE ISSUANCE OF A SEARCH WARRANT.

Affidavits for search warrants must be tested and interpreted by magistrates and courts in a common sense and realistic fashion and reviewing courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a common sense, manner. *United States v. Ventresca*, 380 U.S. 102, 108, 109, 13 L.ed2d 684, 689, 85 S.Ct. 741 (1965). See, also, *United States v. Harris*, 403 U.S. 573, 577, 29 L.ed2d 723, 730, 91 S.Ct. 2075 (1971).

Of course, it is necessary that the affidavit be more than conclusory and the Court has held a search warrant invalid where the supporting affidavit was a "mere affirmation of suspicion and belief." *Nathanson v. United States*, 290 U.S. 41, 46, 78 L.ed 159, 162, 54 S.Ct. 11 (1933). But where the affidavit contains the underlying circumstances and facts from which the

magistrate could find probable cause, then the validity of the search warrant should be upheld. See *Harris*, supra, at 578.

We submit that the affidavit at question in the instant case, on its face, presented the magistrate with sufficient underlying circumsances to support the issuance of a search warrant based upon probable cause.

As petitioner concedes at page six of his petition, the affidavit can be divided into two portions. The first portion relates to the LSD charge and is as follows:

> "Affiant further states that the information upon which he relies is as follows: That on 25th February 1970, at the hour of 12:25 A.M., local time, he drove to said above described housetrailer with Dave Roberts and Jerry Jones, after the said Dave Roberts informed affiant he could purchase LSD tablets or pills there, from a person identified as 'Sonny' Harness. Dave Roberts alighted from affiants automobile, knocked on the housetrailer door and 'Sonny' Harness came to the door, talked with Dave Roberts and admitted him to the trailer. In approximately two (2) minutes Dave Roberts and 'Sonny' Harness reappeared at the door, Dave Roberts came back to the car and delivered two (2) pills or tablets of LSD to this affiant and told affiant he had purchased these pills from 'Sonny' for Five ($5.00) Dollars, which affiant had previously given Roberts."

It is clear that this information alone would supply the probable cause necessary to issue a search warrant. Such information would warrant a man of reasonable caution to believe that LSD was in fact present at petitioner's trailer. This would, therefore, meet the test of "probable cause" laid down in *Draper v. United States*, 358 U.S. 307, 313, 3 L.ed2d 327, 332, 79 S.Ct. 329 (1959); and also the test stated in *Dumbra v. United States*, 268 U.S. 435, 441, 69 L.ed. 1032, 1036, 45 S.Ct. 546 (1925), where it was said:

> "In determining what is probable cause, we are not called upon to determine whether the offense charged has in fact been committed. We are concerned only with the question "whether the affiant had reasonable grounds at the time of his affidavit and the issuance of the warrant for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant."

Petitioner, however, claims that this information is insufficient to support a search warrant because the affiant failed to allege facts showing the informant's reliability. This contention of petitioner is without merit. In *Jones v. United States*, 362 U.S. 257, 4 L.ed2d 697, 80 S.Ct. 725, 78 ALR2d 233 (1960), the rule was set forth that an affidavit which sets out personal observations relating to the existence of cause to search is not to be deemed insufficient by virtue of the fact that it sets out not the affiant's observations but those of another. "An affidavit is not to be deemed insufficient . . . so long as a *substantial basis* for crediting the hearsay is presented." (Emphasis added.) *Id.* at 707. This "substantial basis" test was reaffirmed in *United States v. Harris*, 403 U.S. 573, 29 L.ed2d 723, 91 S.Ct. 2075 (1971). In the instant case the affiant, Officer Bowling, did not relate in his affidavit observations that were solely those of another. Much of what he reported was his own personal obseravtions of what transpired. The fact that Officer Bowling gave Roberts $5.00, sent him to appellant's trailer to buy LSD and Roberts returned with two LSD tablets was within the personal knowledge of Officer Bowling. It would be difficult to provide a more "substantial basis" for crediting Roberts than these independent observations and they are a far stronger reason for believing Roberts than a mere statement of an informant's previous reliability.

In *McCreary v. Sigler*, 406 F.2d 1264 (8th Cir., 1969), *cert. denied* 395 U.S. 984, 23 L.ed 2d 773, 89 S.Ct. 2149 (1969), it was

stated that the reliability of an informant may be demonstrated to the magistrate in many collateral ways. *Id.* at 1268. For instance where, as in the instant case, the officer has not previously known the informant, it is not possible for him with certainty to vouch for the informant's reliability (TE 54, 73). It would, however, be ludicrous for the court to foreclose the use of such information in all such instances. Furthermore, to require a bare allegation of an informer's previous reliability in such a case would impose burdens on the police beyond their power to meet. See *United States v. Bozza,* 365 F.2d 206, 225 (2d Cir., 1969). The *McCreary* case, therefore, held that under such circumstances reliability can be best established "by the affiant relating some corroboration of the story which the informant tells." *Id.* at 1269. It is abundantly clear in the instant case that Officer Bowling's affidavit in support of the search warrant contained sufficient independent observations to provide even more than "some corroboration."

In addition, the instant case is similar to *United States v. Harris,* supra, where the affidavit related both the personal observations of the informant and of the affiant and the Court held that there was a substantial basis for crediting the hearsay. The Court in *Harris* also pointed out that when there is a substantial basis for crediting any hearsay involved then an averment of previous reliability is not necessary. *Id.* at 581, 582. We therefore submit that the independent observations of Officer Bowling were sufficient corroboration in themselves of what transpired between Roberts and petitioner, and that the combined observations of Officer Bowling and Roberts provided a substantial basis for crediting the hearsay involved. Therefore, the magistrate was justified upon the basis of this information alone to issue the search warrant.

Petitioner contends that under the decisions of *United States v. Ventresca,* supra; *Spinelli v. United States,* 393 U.S. 410, 21 L.ed2d 637, 89 S.Ct. 584 (1969); and *Aguilar v. Texas,* 378 U.S. 108, 12 L.ed2d 723, 84 S. Ct. 1509 (1964), Roberts' reliability was not shown. This contention is without merit. Even when

viewed in light of these cases, it is clear that the first portion of the affidavit in the instant case is sufficient. It was pointed out in *Spinelli* that the magistrate must assure himself that he is relying on something in the affidavit "more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." *Id.* at 418. Obviously the information provided in the affidavit in the case at hand assured the magistrate his reliance was upon much sounder grounds than this.

We therefore finally submit that even when measured against the two-pronged test of *Aguilar* sufficient probable cause was shown upon the face of the affidavit to justify the issuance of a search warrant. The affidavit clearly sets forth the underlying circumstances to support the allegations of the affiant and reveals enough independent observations to establish the reliability of the informant.

The second portion of the affidavit relates to the alleged sale of marijuana which the trial court felt might have been the result of entrapment and for that reason dismissed the indictment as to the marijuana and suppressed the use of such evidence in the trial of petitioner on the LSD charge. The second portion of the affidavit is as follows:

> "Further affiant states on the 27th February 1970, at 9:45 P.M., local time, he went to the above described trailer and purchased approximately ten (10) grams of hashish or marijuana from Edgar Eugene Harrness for which affiant paid the said Harness the sum of $32.50, U.S. currency."

As to this portion of the affidavit, it is clear that on its face it established probable cause for the issuance of the search warrant by the magistrate. We therefore submit that the affidavit as a whole and each portion of it, in and of itself, was sufficient in the instant case to support the issuance of the search warrant based upon probable cause.

II.

WHERE ONE PORTION OF AN AFFIDAVIT IS SUFFICIENT TO SUPPORT PROBABLE CAUSE, A SUBSEQUENT DETERMINATION THAT ANOTHER PORTION OF THE AFFIDAVIT WAS BASED UPON "ENTRAPPED INFORMATION" WILL NOT DESTROY THE VALIDITY OF THE SEARCH WARRANT.

Petitioner argues that the portion of the affidavit dealing with marijuana is defective because it was based on "entrapped information"; and that, therefore, *ipso facto*, the entire affidavit must be thrown out. This argument is a non sequitur and demonstrably false.

Logically and practically, this affidavit falls into two portions: that portion dealing with marijuana and that portion dealing with LSD. Even if the petitioner is correct in his argument that the information on marijuana must be excluded because of the means by which it was obtained, the information regarding petitioner's possession of LSD can stand on its own and still constitute probable cause. (See respondent's brief, Argument I.) The information on LSD was sufficient to support the issuance of a separate search warrant; however, in the interest of efficiency, one search warrant was issued to covered both the LSD and the marijuana.

Today there is no justification for construing an affidavit or search warrant as if it were a common law writ. *United States v. Harris*, 403 U.S. 573, 579, 29 L.ed2d 723, 731, 91 S.Ct. 2075 (1971). This Court has made it clear that affidavits for search warrants must be considered realistically. In *United States v. Ventresca*, 380 U.S. 102, 13 L.ed2d 684 at 689, 85 S.Ct. 741 (1965), this Court said:

> "These decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional

requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common sense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward wararnts will tend to discourage police officers from submitting their evidence to a judicial officer before acting."

We believe this statement reflects the proper approach to the issue raised herein. The information on the LSD raises independent grounds upon which a search warrant could have been issued. The fact that this information was consolidated in an affidavit with other evidence later adjudged to have been obtained by entrapment should not vitiate the search warrant as it applied to the LSD.

Thus, it is unnecessary for this Court to consider the question of whether "entrapped evidence" can be used in an affidavit to establish probable cause, because determination of this question is neither material nor decisive in the case at bar.

III.

THE COURT OF APPEALS OF KENTUCKY CORRECTLY DECIDED, *BASED ON KENTUCKY LAW*, THAT WHERE THE "AFFIDAVIT IS REGULAR IN FORM AND THE STATEMENTS CONTAINED THEREIN SUFFICIENTLY SHOW PROBABLE CAUSE, IT IS NOT PROPER TO GO BEHIND THE ALLEGATIONS OF THE AFFIDAVIT IN DETERMINING WHETHER THE ALLEGATIONS FURNISH SUFFICIENT PROBABLE CAUSE."

Petitioner asserts that the Kentucky Court of Appeals decided in this case that illegally obtained information could be used in an affidavit to support the issuance of a search warrant. This is an incorrect assertion.

In its decision the Kentucky court stated that the affidavit was sufficient on its face and, *under Kentucky law,* it is improper to go behind the allegations of the affidavit to determine whether they furnish probable cause. See *Mattingly v. Commonwealth,* 310 Ky. 561, 221 S.W.2d 82 (1949); *Commonwealth v. Thacker,* 229 Ky. 488, 17 S.W.2d 399 (1929).

There were two separate portions of information set out on the face of the affidavit from which the Kentucky court had to look to determine if probable cause had been established; that portion relating to the marijuana and that portion relating to the LSD.

On its face, the information furnished in the marijuana portion was clearly sufficient to establish probable cause to support the magistrate's issuance of the search warrant. Having determined that this portion, in and of itself, was sufficient to establish probable cause, the Kentucky court considered it unnecessary to determine the sufficiency of the portion of the affidavit dealing with the LSD.

The basis of the Kentucky court's decision was that the affidavit was sufficient on its face to establish probable cause and *under Kentucky law* it was improper to go behind the affidavit to determine the sufficiency, not that illegally obtained information could support the issuance of a search warrant as petitioner asserts.

After making the above assertion, petitioner further contends, on page 5 of his petition, that the "broad and general form of the narrow issue presented here is whether or not the integrity of an affidavit may be attacked."

Persuasive argument can be made on both sides of this

question. The Kentucky Courts have decided this question by stating that where an affidavit is regular in form and sufficient on its face to establish probable cause it is improper to go behind the allegations of the affidavit to determine whether the allegations furnish sufficient evidence of probable cause. *Mattingly; Thacker,* supra.

In *Spencer v. Texas,* 385 U.S. 554, 564, 17 L.ed. 2d 606, 87 S.Ct. 648 (1967), this Court stated:

> "Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial . . . But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority . . . As Mr. Justice Cardozo had occasion to remark, a state rule of law 'does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar.' Snyder v. Massachusetts, 291 US 97, 105, 78 L.ed 674, 677, 54 S.C.t 330, 90 ALR 575. See also Buchalter v. New York, 319 US 427, 87 L.ed 1492, 63 S. Ct. 1129."

We submit that the rule in Kentucky which prohibits a court from looking behind an affidavit is judicially sound, both as to law and policy.

It must be remembered, as the petitioner points out, that the procedure by which a search warrant is obtained is, pursuant to Kentucky and federal law, an ex parte proceeding.

The magistrate has but one function, to wit: the determination of whether (vel non) probable cause exists. The issue in such proceedings is not guilt beyond a reasonable doubt. *United States v. Harris,* 403 U.S. 573, 29 L.ed2d 723, 91 S.Ct. 2075 (1971).

Moreover, it is germane to the issues herein raised that affidavits of probable cause to support the issuance of a search

warrant are tested by much less rigorous standards than those governing the admissibility of evidence at the trial level. In *United States v. Ventresca*, 380 U.S. 102, 13 L.ed2d 684, 85 S.Ct. 741 (1965), this Court stated at page 107:

> "While a warrant may issue only upon a finding of 'probable cause,' this Court has long held that 'the term "probable cause" . . . means less than evidence which would justify condemnation,' Locke v. United States, 7 Cranch 339, 348, 3 L.ed 364, 367, and that a finding of 'probable cause' may rest upon evidence which is not legally competent in a criminal trial. Draper v. United States, 358 U.S. 307, 311, 3 L.ed2d 327, 331, 79 S.Ct. 329."

This Court has consistently upheld the idea that magistrates in search wararnt proceedings are not to be limited by excessive restrictions. Rather, they are to use common sense. *Spinelli v. United States*, 393 U.S. 410, 21 L.ed2d 637, 89 S.Ct. 584 (1969).

CONCLUSION

The petitioner has failed to properly meet the jurisdictional requirements or to present a substantial federal question necessary for the consideration of this Court. For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,
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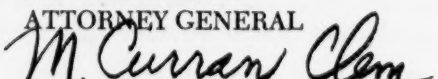

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PROOF OF SERVICE

I, M. Curran Clem, one of counsel for respondent, hereby certify that the foregoing Brief was served on petitioner by depositing three copies of same in the United States mail, first class postage prepaid, on July 12, 1972, addressed to counsel for petitioner, Honorable C. B. Creech, Honorable Astor Hogg, and Honorable Michael D. Johnson, 1107 2nd National Bank Building, Ashland, Kentucky 41101.

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